

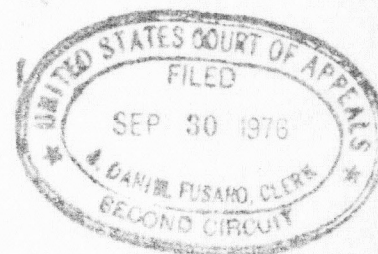
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL
76-7314

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



BANK FÜR GEMEINWIRTSCHAFT
AKTIENGESELLSCHAFT,

Plaintiff-Appellant-Appellee,

VS.

AMTRACO CORPORATION.

Defendant-Appellee-Appellant.

On Appeal from a Judgment of the United States
District Court for the Southern District of
New York After Trial

BRIEF FOR DEFENDANT-APPELLEE-APPELLANT

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STATEMENT OF THE ISSUES

1. Was the District Court in error in ruling that when both parties conceded that the defendant-buyer was purchasing the goods for the account of another customer and the purchase order specifically stated the defendant-buyer would pay the plaintiff-seller after inspection and upon delivery, that delivery of the goods was not a condition precedent to the buyer's obligation to pay?

2. Did the District Court err in ruling that although the defendant-buyer's customer refused to accept delivery of the goods through no fault of the buyer's, the purchase order stated that payment was to be made after inspection upon delivery, and it was conceded that both the seller and buyer knew the buyer was purchasing the goods for this customer's account, that the buyer was nevertheless obligated to accept such goods?

3. Was the District Court's finding that plaintiff-appellant did not resell the goods in question in a commercially reasonable manner after the buyer's default clearly erroneous so as to warrant reversal by this Court?

4. When the only evidence with respect to plaintiff-appellant resale indicated that the goods were not resold by

plaintiff for two years after the alleged repudiation date even though there was a daily and viable market for the goods immediately after the repudiation date and the market price for such goods was equal to, if not greater than the contract price, was the finding of the District Court that plaintiff-appellant failed to establish the commercial reasonableness of its resale clearly erroneous?

5. Was it clearly erroneous for the District Court to conclude that since plaintiff's resale was commercially unreasonable plaintiff may not recover any incidental damages it incurred in connection with such unreasonable resale?

STATEMENT OF THE CASE*

Defendant-appellee-appellant Amtraco Corporation (hereinafter "Amtraco") submits this brief in opposition to the appeal of plaintiff-appellant-appellee Bank Fur Gemeinwirtschaftaktiengesellschaft (hereinafter "BFG") from that part of the judgment of the Hon. Whitman Knapp filed June 1, 1976 (A-166) which denied BFG an award of damages and in support of its appeal from this judgment to the extent said judgment deemed Amtraco liable to BFG for breach of contract. Amtraco's cross-notice of appeal was filed on July 6, 1976 (A-169).

This is an action for breach of a written contract based upon Amtraco's alleged failure to accept delivery of edible lactose. The Trial Court filed two memorandum decisions constituting its findings of fact and conclusions of law. The first decision (A-139-145) dated January 26, 1976 found that Amtraco was liable to BFG for breach of contract and awarded damages amounting to \$45,347.97 based on a formula set forth in the Court's decision.

Thereafter, the Court filed an amended opinion making new findings of fact and conclusions of law on May 20, 1976

* Unless otherwise indicated, all page references following the letter "A" are to page numbers in the joint appendix; unless otherwise indicated, all page references following the letter "E" are to page numbers in the compendium of exhibits submitted under separate cover.

after Amtraco had made a motion pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure. This motion (A 146-158) was limited solely to the issue of damages and was premised on a factual error contained in the Court's initial decision pertaining to the market price of lactose after the date of the alleged breach. The Court in its amended decision acknowledged that such a factual error was made and after correcting this error determined that no damages had been established by BFG (A 160-165). Accordingly, the Court filed a judgment finding Amtraco liable to BFG but awarding no damages (A 167-168).

STATEMENT OF FACTS

Facts Pertaining to Liability

The essential facts pertaining to the question of liability were for the most part not in dispute and the Court's decision was based primarily on legal conclusions drawn from such facts. Indeed, at the conclusion of the trial the Court specifically observed that there did not appear to be "any issue of credibility before [it] . . ." (A-137). These facts reveal that Amtraco is a trading company involved in the importation and exportation of commodities and other products on behalf of manufacturers throughout the world, and in performing such function acts as the selling agent of foreign companies who wish to sell

commodities in the United States and as a representative of domestic companies who wished to sell products overseas (A 95-96). Amtraco was not in the business of buying and selling goods for its own use but bought and sold goods for the account and on behalf of others.

In September, 1971, one of Amtraco's representatives in Europe was approached by Hans Theo Baumann, sales manager of a division of Molkerei J. A. Meggle (hereinafter "Meggle"), Europe's largest producer of edible lactose* (A 17-18). Mr. Baumann, who was called by BFG, testified that his company was requested by BFG to aid it in selling a certain quantity of lactose (A 20). At that time the lactose was in storage in a warehouse in New Jersey and had been in storage there since February, 1971 (A 47). Apparently, this lactose had been previously sold by Meggle to a firm by the name of Bauer International and BFG had thereafter obtained the goods as part of a security arrangement (A 39-42).

The purchase agreement, BFG's Exhibit 1 (E-29), which had been executed only by Amtraco, indicates that the agreement was between Amtraco and Meggle rather than between Amtraco and

* Edible lactose is a by-product of milk consisting of the sugar that is obtained by extraction from whey. It is primarily used for pharmaceutical purposes or in the food industry as a sweetening agent (A 97).

BFG. Mr. Baumann testified that Meggle was not acting for its own account but was acting on behalf of BFG to aid it in disposing of the lactose (A 20). Mr. Baumann stated that he did not advise Amtraco that Meggle was not selling the lactose for its own account until October 20, 1971, approximately three weeks after Amtraco signed the purchase agreement (A 37).

Both parties conceded that at the time the agreement was entered into it was recognized that Amtraco was not purchasing the lactose for its own account but was purchasing it for a Canadian customer. Amtraco's executive vice president, Richard Jove, testified as follows:

"Q Were these goods purchased for Amtraco's own account?

A No.

Q For who were they purchased?

A We arranged to act as middleman to make delivery to a Canadian concern.

Q And the name of the Canadian concern?

A Is Montreal Casein and was a subsidiary of a company called Peebles" (A 99).

Similarly, Mr. Baumann, who negotiated the transaction on behalf of BFG, acknowledged that he also recognized that Amtraco was not purchasing lactose for its own account.

"Q In your discussions with Amtraco leading up to this purchase order you were advised, were you not, that Amtraco was going to sell the lactose to a Canadian customer?

A We noticed this in the confirmation of the purchase.

Q So you also knew that they were not buying it for their own account, for themselves?

A Yes. (A 45)

Thus, the nature of the transaction entered into between Amtraco and Meggle on behalf of BFG was not disputed by either of the parties at trial.

The purchase order, BFG's Exhibit 1 (E-29), amply bears out this conclusion and specifically states that the goods will be delivered to Canada and payment will be made upon delivery:

"Payment will be made by [Amtraco] to American Bank and Trust Co. New York after goods have passed inspection of the Canadian Government Authorities, upon delivery."

The very date this purchase confirmation was issued to Meggle on behalf of BFG, September 30, 1971, Amtraco also issued a sales contract to Montreal Casein Co. Ltd., the Canadian customer (BFG's Exhibit 13, E-209). It was undisputed that the lactose covered by this sales contract was the same lactose which was the subject of the purchase confirmation (BFG's Exhibit 1, A 80-81). Thus, just as Meggle signed the purchase order with Amtraco on behalf of BFG, so did Amtraco sign the agreement with

Meggle on behalf of the Canadian customer

Mr. Jove, Amtraco's executive vice president, testified that it was the understanding of the parties that delivery of the goods to the Canadian customer and acceptance by that customer was a "necessary condition of the transaction" (A 86). Likewise, Mr. Baumann acknowledged that inspection of the goods by the Canadian governmental authorities could only occur once delivery to the Canadian customer was made.

"Q You also knew that Amtraco was only to make payment upon delivery, is that correct?

A No, we didn't know. No, only after the inspection by the Canadian authorities.

Q Doesn't that have to be upon delivery?

A Yes, naturally.

Q Of course. They would not inspect them in the New Jersey warehouse, that is correct, isn't it?

A Not the Canadian authorities."

Accordingly, Mr. Baumann's acknowledgment that he recognized that Amtraco was purchasing the lactose ^{by the} ~~on~~ account of the Canadian customer plus the wording of the purchase agreement itself, which stated that payment was only to be made upon delivery and passage of the goods by Canadian governmental authorities, demonstrate that Amtraco's obligation was limited to and conditioned upon acceptance of the goods by the Canadian customer.

Amtraco's Canadian Customer Refused
to Accept Delivery of the Goods

The transaction between the parties was scheduled to be effective as of October 20, 1971. BFG's Exhibit 1, the purchase confirmation, states that delivery was to be made as of October 20, 1971. Similarly, the sales contract between Amtraco and the Canadian customer stated that shipment was to be made in the second half of October via truck or rail at the seller's option (E 209). However, the contract arrangements were never consummated since shortly after the purchase order and sales order were issued, the Canadian purchaser informed Amtraco that the representative apparently acting on the Canadian customer's behalf was without authority to make the purchase in question and that it was unwilling to accept delivery of the goods to Canada (A 87). Indeed, BFG's counsel at trial stipulated that Amtraco was not at fault for the Canadian customer's decision to cancel the contract (A 103).

After Amtraco learned of the Canadian customer's refusal to accept delivery of the lactose, Amtraco made repeated attempts to reestablish the transaction (A 104). However, the Canadian customer refused to open the letter of credit pursuant to the sales contract ^{and} to accept delivery of the goods into Canada (A 104). Accordingly, the transaction was never consummated and the goods were never accepted by the Canadian customer for delivery.

As a result of the Canadian customer's cancellation of the contract, Amtraco never took possession or control of the goods in the warehouse in New Jersey (A 72). BFG's witness, Fabio Bohorquez, assistant treasurer of the American Bank & Trust Company, BFG's agent in New York, testified that American Bank & Trust Company at all times retained possession and control of the goods and that the goods were never delivered or transferred to the control and custody of Amtraco (A 72-74).

The uncontroverted facts presented establish that Amtraco's obligation on the purchase contract was to be conditioned on the goods first being delivered to the Canadian customers and passing inspection at the customer's premises by Canadian governmental authorities. Since clearly such inspection could only occur after delivery of the goods to the customer and since both parties acknowledged that Amtraco was purchasing the goods for this customer's account, Amtraco's obligation under the contract did not arise until such delivery was effected. As it was conceded that this delivery did not occur through no fault of Amtraco's, Amtraco's liability did not arise pursuant to the terms of the purchase order.

Statement of Facts
Pertaining to Damages

BFG did not offer any evidence pertaining to the market

price at the time of the alleged breach to establish the difference between the market price and the contract price, but, instead, simply offered into evidence documents indicating what BFG received for its eventual resale of the lactose.* This schedule of resale (E 33) demonstrates that 75% of the bags involved in the purchase order ^{was} were not resold by BFG until ~~between~~ one-and-a-half to two years after October 20, 1971, the date Amtraco was purportedly obligated to accept the goods. Thus, the schedule indicates that of the 19,838 bags resold, 4,000 of these bags were sold on April 4, 1973, 18 months after October, 1971; 3,200 bags were sold on April 20, 1973; and 8,800 bags, constituting almost 50% of the total lot, were sold on October 15, 1973, two years after the date Amtraco was purportedly obligated to accept delivery of the goods. No explanation was offered by BFG as to why such a long period of time was required before the bags were resold.

The damages BFG claimed constituted the difference between the purported contract price of \$95,722** and the \$80,402.18 BFG received for resale over this long period of

* As will be discussed below, the uncontroverted facts established that the market price at the time of the alleged breach was equal to or greater than the contract price.

** Obtained by multiplying the quantity of 503.8 metric tons provided for in the purchase order by the price of \$190.00 per metric ton set forth in the contract as .19¢ per kilo.

time (E 33). Additionally, BFG sought various incidental expenses, the bulk of which consisted of exorbitant storage charges which accrued at the rate of approximately \$2,700 per month (BFG's Exhibit 5, E 73-74). These storage charges for the two-year period after October 20, 1971 amounted to the incredible sum of \$56,699 and represented by far the largest portion of BFG's claimed damages.

At trial Amtraco called as an expert witness Victor S. Najda, a prominent dairy broker. Mr. Najda had substantial expertise in the buying and selling of lactose (A 119) and had frequently been consulted by the United States Department of Agriculture and the dairy industry with respect to the market price of edible lactose (A 119-120). At the conclusion of trial the court stated that Mr. Najda impressed it as being "a very knowledgeable broker" (A 137) and that both parties could "assume that [it] credited [Mr. Najda's] testimony, because it seemed [to the court, that] he was both knowledgeable and candid." (A 137). Mr. Najda testified that edible lactose is a commonly used product which is sold on the market on a day-to-day basis.

"Q Is edible lactose a commonly used product?

A Yes.

Q On a day-to-day basis is there a demand for the lactose?

A Yes, there is.

Q Is it constantly being bought and sold every single day just about?

A Just about." (A 120).

Significantly, Mr. Baumann, BFG's own witness, conceded this fact as well.

"Q What is edible lactose used for?

A Among other things, it is used for baby food. In a very broad way, it is used in the food industry in general.

Q Does it have a wide use?

A Yes.

Q It is something that is commonly sold, is it not?

A Yes.

Q In fact, edible lactose is sold almost on a daily basis, that is correct as well, isn't it?

A Yes.

Q It is sold world wide?

A Yes.

Q Is the United States a large market for edible lactose?

A Yes." (A 38-39).

Mr. Najda further testified that the normal commercial procedure to follow in order to sell edible lactose would be to call a broker who is in the business to handle the sale (A 122), and if BFG had followed this procedure the amount of lactose

involved, i.e., 503.8 metric tons, could have readily been sold in one to two weeks.

"Q Is lactose a product that can be sold at any time, assuming you contacted a broker?

A Yes.

Q This was true in 1971 and 1972 as well?

A That's right.

Q Generally how long does it take to effect a sale of lactose?

A Well, it depends on the market conditions, but not very long, say a week or two weeks.

THE COURT: There is not an exchange where it is sold like the cotton exchange or the sugar exchange?

THE WITNESS: No.

Q Is the quantity, the amount being sold, a factor in determining how long it might take to dispose of it?

A Yes.

Q In this particular instance the amount of lactose involved is 503.8 metric tons. Is that considered a large amount of edible lactose?

A Not particularly." (A 122).

It is highly significant that BFG conceded that it failed to take the most basic and commercially reasonable step of contacting a lactose broker. Mr. Baumann testified that instead of contacting the lactose broker in order to aid BFG

in disposing of the lactose, BFG, through Meggle, arranged to contact Mr. Silverman who was described as "a business friend... of PTX food in White Plains..." (A 30). Mr. Baumann conceded that Mr. Silverman was not a lactose broker but was contacted because he was a business friend and because BFG believed he would have good contacts in the United States.

"Q Was Mr. Silverman known to you to be a dealer of lactose?

A Not as a dealer in lactose, but as a good businessman involved in the milk industry with good contracts all over the United States." (A 31)

Mr. Baumann also conceded that he did not even bother to contact Mr. Silverman until sometime in the middle of 1972, approximately 9 months after Amtraco refused to take the goods into its possession (A 31). Of course, as the schedule of sale described above demonstrates, Mr. Silverman himself did not sell approximately 75% of the lactose in storage for another year to a-year-and-a-quarter after Mr. Baumann contacted him.

The Court, both in its initial decision and its amended decision, found that the evidence offered by BFG totally failed to satisfy BFG's burden with respect to damages.* Thus, in its

* As will be discussed more fully below, the court initially awarded BFG damages on a mistaken factual issue pertaining to evidence offered by Amtraco.

initial decision Judge Knapp stated as follows:

"In attempted discharge of its burden, plaintiff relies simply on the documentation of the time and terms of the resales it did eventually consummate over a two-year period. All we know with respect to the background of these sales is that the matter was put in the hands of a certain Mr. Silverman, a non-broker. Assuming - although the record is rather sparse on this - that Silverman was the best (or at least an appropriate) person to handle the matter, there is no evidence from him or anyone else as to what efforts he in fact made to resell the goods. All we know is that after a long time (and a great deal of storage expense) he finally did sell it. This clearly is not enough to satisfy plaintiff's burden." (A 143-144).

Despite the Court's conclusion in its initial decision that BFG clearly did not present sufficient evidence to satisfy its burden of proof, the Court awarded BFG damages because of its mistaken assumption as to the market price - a mistake which was acknowledged not only by the Court in its amended opinion (A 163) but by BFG's counsel as well (BFG's brief, p. 8). Thus, the Court incorrectly concluded that the evidence Amtraco presented indicated that the market price of edible lactose during the period after the breach was significantly below the contract price rather than equal to or greater than the contract price as the evidence actually demonstrated. Because of this false assumption the Court concluded that since the market price had sharply fallen BFG was justified in holding onto the lactose for a few months, and that a settlement offer by Amtraco, without

prejudice to Amtraco's position that it had no contractual obligation, to buy the lactose at a reduced price in June, 1973, constituted a basis on which to determine damages. Of course, since the price of lactose in actuality did not fall, the Court in its amended decision recognized that there was no possible basis for this initial determination (A 163-164).*

The contract price listed in the purchase order stated that 503.8 metric tons of lactose were to be sold to Amtraco for the sum of \$95,722. Since one metric ton is equal to 2,204.6 pounds (Webster's New Collegiate Dictionary, 1975 ed., G & C Merriam Co., p. 724), the total weight of lactose covered by the purchase order amounted to 1,110,674 pounds. Dividing this sum into \$95,722 demonstrates that under the contract the price-per-pound for the lactose in terms of dollars was approximately 8-3/5 cents per pound. The price listed on the sales contract between Amtraco and the Canadian customer was 12 cents-per-pound (E 209).

To establish market price at trial Amtraco offered into evidence copies of a trade journal entitled "The Chemical

* The no-prejudice offer by Amtraco could not be used as a basis for computing damages in any event since (1) Amtraco never offered to pay for the storage charges from October, 1971 until June, 1972; (2) at the time the no-prejudice offer was made, the lactose was eight months older and worth less; and (3) in the Spring of 1972 the market price had actually begun to fall. See infra. Accordingly, such a no-prejudice offer could not in any sense be deemed a recognition of the propriety of BFG's conduct.

Marketing Reporter." However, rather than encumber the record with numerous copies of this Reporter which is published on a weekly basis, the parties agreed to use a summary sheet of prices listed in the Reporter instead (A 115). This schedule, defendant's Exhibit WWW (E 26), reveals that ^{from} ~~as~~ of October 20, 1971, the time of the alleged breach, ^{through} ~~and during~~ the first week of April, 1972, the market price for edible lactose was listed as 18-1/2 cents per pound. A copy of the Reporter itself was annexed to Amtraco's motion to amend the district court's findings (A 159).

Mr. Najda testified that in determining the market price for lactose at any given time, it is customary to refer to the Chemical Marketing Reporter listing the weekly market price (A 123). Mr. Najda stated that the market price listed in the Chemical Marketing Reporter was accurate to within "1 or 2 cents a pound" (A 123). However, in this particular instance he stated that the lactose had been in storage for approximately nine months as of October, 1971 and, accordingly, its market price would be reduced because people in the market would be aware that the seller was attempting to dispose of older merchandise. Mr. Najda stated that lactose in storage for this period of time would sell for approximately 2 to 4 cents below the actual market price per pound (A 126). He emphasized, of course, that this figure assumed that the lactose

was of good quality. However, both parties conceded that there was no issue as to the quality of the lactose and that it was assumed by both of them that the quality was proper (A 125).

Mr. Najda further testified that one other factor, the condition of the domestic market, could also have an effect on the listed market price and reduce it further to the extent of 3 to 5 cents per pound (A 130). However, he emphasized that there was always a viable market in lactose within this range (A 131).

Taking into account the 2¢ to 4¢ per pound reduction in price because of the age of the lactose and the 3¢ to 5¢ reduction by reason of normal market fluctuation in the domestic supply, the price for the particular lactose in question would have been between 5¢ to 9¢ less per pound than the market price listed in the Chemical Reporter. Thus, the appropriate sales price of the lactose in question would ^{have} ~~been~~ in the range ~~from~~ 9¢ to 13¢ per pound. Significantly, this is almost the exact price which was called for in the initial contract. The price listed in the purchase confirmation between Amtraco and Meggle was 8-3/5 cents per pound and the price listed in the sales contract between Amtraco and the Canadian customer was 12 cents per pound.

The prices listed in the Chemical Marketing Reporter

(defendant's Exhibit WWW, E 26) indicated that the market price for lactose remained the same from the beginning of October, 1971 through the 1st week of ^{April} March, 1972 and then dropped approximately 1-1/2 cents per pound from 18-1/2 cents to 17 cents per pound. The unrefuted testimony of Mr. Najda demonstrated that had BFG contacted a lactose broker in October, 1971, the lactose could have been sold in one to two weeks. The fact that BFG did not take such a commercially reasonable step, resulted in the lactose being kept in storage for a two-year period thereby further reducing its value and causing the lactose to be sold after the market price had decreased. (See defendant's Exhibit XXX, E 28) listing the price per pound of lactose in the Chemical Marketing Reporter for the period February 5, 1973 - May 28, 1973).

Accordingly, not only did BFG itself fail to prove that it sold the lactose in a commercially reasonable manner, but Mr. Najda's testimony established beyond question that BFG's resale was not conducted in a commercially reasonable manner. Indeed, the fact that approximately 75% of the goods involved ^{was} were not sold until 18 to 24 months after the alleged breach demonstrates that the procedures followed by BFG were unconscionable and totally unreasonable, particularly in light of the exorbitant storage charges which were accumulating during this period of time and the existence of a daily market in

lactose at a price equal to, if not greater, than the contract price.

BFG's Attempt To Justify Its
Conduct In Failing To Immediately Dispose Of The Lactose.

BFG has essentially presented two arguments in its brief to try and justify its failure not to have immediately sold the lactose. First, BFG argues that Mr. Baumann testified that it was preferable to sell lactose in small quantities since it would be easier to obtain a higher price for smaller quantities than for one large quantity. However, although Mr. Baumann did state that it might be preferable to sell the lactose in small quantities, he did not testify as to how long it should take to sell such lactose or whether it was in any way reasonable for BFG to retain the lactose for one-and-a-half to two years before attempting to resell it. Indeed, Mr. Baumann presented no evidence whatsoever as to the manner or time of the resale.

Furthermore, BFG's own records demonstrate that approximately 75% of the lactose was disposed of in only three sales and approximately 50% of the lactose was sold in one sale alone. As explained above, of the 19,838 bags that were resold, 8,800 bags constituting almost 50% of the total lot were sold in a single sale on October 15, 1973, two years after the alleged breach,

while 7,200 bags were sold in two sales in April, 1973, one-and-a-half years after the alleged breach. Accordingly, BFG did not attempt to dispose of the lactose in small quantities over a period of time, but held on to the goods for 18 to 24 months after the alleged repudiation date without explanation and then sold the lactose in three large sales at that time.*

The only other explanation offered by BFG to explain its conduct was that certain telex communications between the parties in an attempt to settle this dispute justified BFG in holding onto the lactose for a long period of time. The district court's amended opinion curtly rejected this contention:

"Nor can we accept plaintiff's contention that defendant impliedly authorized plaintiff's method of resale by leading it to believe in its post-breach negotiations that defendant still considered the contract viable and that plaintiff was therefore justified in keeping the lactose in storage. The telex communications upon which plaintiff relies do not support - indeed, they are inconsistent with - any such conclusion. Each telex contains a disclaimer making abundantly clear defendant's position that no contract existed between the parties, and the entire telex communication can only be interpreted as an attempt by defendant to negotiate and settle the dispute arising out of plaintiff's contrary position. These telexes cannot be interpreted as a request - or authorization - that plaintiff maintain the lactose in storage." (A 164)

* As discussed above, Mr. Najda testified that the amount of lactose involved here, i.e., 503.8 metric tons, is not considered a particularly large amount of lactose and that such an amount could have readily been sold in one to two weeks (A 122).

Indeed, in footnote No. 4 of the court's opinion (A 166), Judge Knapp quoted several of the telexes to demonstrate that BFG had absolutely no justification for retaining the lactose based upon these settlement negotiations, since in these telexes Amtraco specifically advised BFG that the offers were without prejudice and Amtraco had no contractual obligations.

BFG's own conduct as well sharply belies the fact that it relied on these telexes to retain the lactose. Absolutely no testimony was presented by any of BFG's witnesses to the effect that BFG retained the lactose because of the ongoing communications with Amtraco or that it somehow relied on these negotiations as a reason for not attempting to dispose of the lactose.

Furthermore, and even of greater significance, after these negotiations broke down in June of 1972, BFG still did not attempt to resell most of the lactose for another year thereafter. Thus, as noted above, 50% of the lactose was not sold until October, 1973 and 25% of the lactose was not sold until April, 1973. Clearly then, the negotiations had nothing to do with BFG's decision to retain or attempt to sell the lactose. Under such circumstances BFG cannot in any sense be justified in seeking damages based upon the commercial reasonableness of its resale.

POINT I

IT WAS A CONDITION PRECEDENT OF THE
PURCHASE ORDER SIGNED BY AMTRACO
THAT THE GOODS BE DELIVERED TO THE
CANADIAN CUSTOMER

The appropriate standards to be followed in determining when the terms of a contract establish a condition precedent were set forth in Amies v. Wesnofske, 255 N.Y. 156 (1931):*

"The employment of such words as 'when,' 'after,' or 'as soon as,' clearly indicate that a promise is not to be performed except upon a condition." Id. at 161.

The purchase order specifically states that "...payment will be made...after goods have passed inspection...upon delivery." It is undisputed that Amtraco was purchasing the goods for the account of the Canadian customer and that inspection of the goods could only occur upon delivery to the premises of the Canadian customer. Furthermore, it was recognized by all parties concerned that Amtraco was acting on behalf of this customer just as Meggle was acting as an agent for BFG. Thus, the use of the word "after" on the purchase order between Amtraco and Meggle comes squarely within the standards set forth by the court in Amies and establishes that delivery was a condition precedent to Amtraco's obligations.

* As this is a diversity case, the law of New York applies.

The facts in Amies are particularly appropriate to the present case. There a broker had sued to obtain commissions pertaining to the purchase of real property he negotiated. However, although a contract had been signed, the purchaser defaulted on his obligations and the seller, instead of suing the purchaser, acquiesced in the default and did not seek to enforce his rights under the contract. The writing between the vendor and the broker specifically stated that the broker was to be paid for its services "in bringing about such sale the sum of Five Thousand (\$5,000) Dollars, one-half of which is paid this date and the balance to be paid on the closing of title." There was no question but that the broker performed all services required of it and obtained a contract between the purchaser and seller for the property. Nevertheless, the Court held that since title never actually passed and the closing never actually occurred, the broker was not entitled to his commission.

In explaining the rationale of its decision the Court emphasized that when conditional terms are imposed in the writing they must be fulfilled before any obligation will be created. Thus, the Court explained that such terms as "upon delivery of the deed" or "when the sale is completed" require in such instances that the deed actually be delivered or that the sale actually be completed. Id. at 161.

This rationale is directly applicable to the present case. Under the terms of the purchase order, delivery of the goods to the Canadian customer was clearly a condition precedent of the contract and was central to the parties' understanding as to when, if ever, payment would be made. Furthermore, the refusal of the Canadian customer to accept delivery admittedly occurred through no fault of Amtraco, and it was undisputed that Amtraco neither prevented nor hindered the Canadian customer from acceptance. Thus, as in Amies, Amtraco cannot become liable upon the contract by reason of the failure of a condition precedent to occur. Mr. Baumann's concession that Amtraco was purchasing the goods for the account of ^{its} ~~his~~ customer underscores this point all the more.

The same result was reached by the Court in Mascioni v. I.B. Miller, Inc., 261 N.Y.1 (1933) on an even stronger set of facts. There plaintiff, a subcontractor, sought to recover from defendant, the general contractor, the value of labor and materials which the subcontractor had furnished the contractor. The terms of the contract between the subcontractor and the contractor provided that "Payments to be made as received from the Owner." The Court held that since the owner had made no payments to the contractor for the work and materials furnished by the subcontractor, the subcontractor was not entitled to recover from the contractor, notwithstanding that it had already provided the labor and materials. The

Court explicitly rejected the contention that the condition only related to the time of payment, and held that the payment by the owner to the contractor was a condition precedent to the creation of the contractor's obligation to the subcontractor:

"From the express promise to pay upon the happening of an event, an inference may be drawn that the parties did not intend or impliedly agree that payment should be made even if the event does not occur."
Id at 4.

The Court further emphasized that the obligation to pay under the contract can only arise when the express conditions of the contract have been satisfied:

"A provision for the payment of an obligation upon the happening of an event does not become absolute until the happening of the event. Whether the defendant's express promise to pay is construed as a promise to pay 'if' payment is made by the owner or 'when' such payment is made, 'the result must be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted.'"
(Amies v. Wesnofske, 255 N.Y. 156, 162)
Id at 4.

Of course, in the present case, unlike the situation in Mascioni, Amtraco received no benefit by reason of the Canadian customer's failure to accept delivery and, in fact, clearly lost the

benefit of the profit it would have otherwise earned. In Mascioni, however, the contractor had received the full benefit of the subcontractor's work. Nevertheless, by reason of the condition precedent in the contract, it was not obligated to pay the subcontractor for the materials and services it received.

The term in the purchase order here requiring payment only upon "delivery" to the Canadian customer is no less demanding than the term in the agreement in Mascioni. Accord: Boston Road Shopping Center, Inc. vs. Teacher Insurance & Annuity Association of America, 13 A.D.2d 106, 213 N.Y.S.2d 522 (1st Dept. 1961), aff'd, 11 N.Y.2d 831 (1961); Dieterle v. Gatton, 397 F.2d 155 (6th Cir. 1968). Furthermore, it was conceded by both parties that the purchase by Amtraco was being made for the account of the Canadian customer. See Clearview Associates, Inc. v. Clearview Gardens First Corp., 285 App. Div. 969, 139 N.Y.S.2d 81 (2d Dept. 1955) ("An agent acting within the scope of its authority, as agent for a known principal, is not liable to a third person for breach of contract by the principal"); Wyckoff v. O'Neil, 54 Misc. 2d 333, 314 N.Y.S.2d 410 (Sup. Ct. Monroe Co. 1970). Accordingly, since delivery was never made, Amtraco never became liable to BFG under the purchase order.

POINT II

FAILURE OF THE CANADIAN CUSTOMER TO
ACCEPT DELIVERY OF THE GOODS CONSTITUTED
A FAILURE OF A PRESUPPOSED CONDITION OF
THE PURCHASE ORDER BETWEEN AMTRACO AND BFG,
AND AFTER AMTRACO'S GOOD FAITH EFFORTS
TO NEGOTIATE A NEW AGREEMENT WERE RE-
JECTED BY BFG, AMTRACO WAS RELIEVED OF
ANY LIABILITY UNDER THE PURCHASE ORDER
PURSUANT TO UCC §2-615.

UCC §2-615 expressly excuses the performance of the contract when the performance has become impractical by reason of an event which constituted a basic assumption upon which the contract was made. This provision in pertinent part provides as follows:

"Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

Official comment No. 3 emphasizes that the test is one of "commercial impracticability" rather than impossibility.

Although this section is primarily directed to relieving

the seller of an obligation when there occurs a contingency, the non-occurrence of which was a basic assumption of the contract, the official commentary states that the same reasoning was intended to apply to buyers as well:

"9. . . . On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption . . . the reason of the present section may well apply and entitle the buyer to the exemption."

This conclusion is confirmed by Professor Hawkland in Sales And Bulk Sales, page 112, as well:

"While Section 2-615 talks only in terms of excusing the seller by reason of the failure of pre-supposed conditions, the official comments to this section make it clear that this section can apply to exempt the buyer in proper cases."

The propriety of this result is underscored by UCC §2-614(1) relating to substituted performance by either party when the particular means of delivery contemplated by the contract becomes impractical.

In Badhwar v. Colorado Fuel & Iron Corporation, 138 F. Supp. 595, 607-08 (S.D.N.Y. 1955) the Court, in discussing the proper procedures to follow in allocating the risk of loss when a basic assumption of the contract proves to be invalid, observed:

"Rather than mechanically apply any fixed rule of law, when the parties themselves have not allocated responsibility, justice is better served by appraising all of the circumstances, the part the various parties played, and thereon determining liability. This may well serve to explain any apparent division of authority in this area of the law."

Although Badhwar pre-dated enactment of the UCC, its rationale is plainly applicable to UCC §2-615. See "Practice Commentary" to UCC §2-615 stating that it is "generally consistent with prior New York case law".

Official Comment No. 5 to UCC §2-615 contemplates that this section should be deemed applicable when the parties considered a particular source of supply to be exclusive under the agreement and that source of supply fails through casualty:

"5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting."

By applying this language to a buyer as well as the seller, it becomes clear that when a buyer and seller contemplate that the goods to be purchased were to be used for a particular purpose and that purpose fails through no fault of either party,

then the provisions of UCC §2-615 should be deemed applicable to the buyer as well.

The district court's decision did not specifically discuss UCC §2-615. However, applying the legal standard set forth in that provision, it is apparent that the test of "commercial impracticability" required has been satisfied. The agreement signed by Amtraco was, in the words of Official Comment 9, "conditioned on a definite and specific venture." Indeed, it was the basic assumption of the parties that Amtraco's purchase was to be for the account of the Canadian buyer who was to accept delivery of the lactose covered by the purchase order. BFG's own witness conceded that it was never contemplated that Amtraco was purchasing the goods for its own account or to sell the lactose on the general market. Thus, the failure of the Canadian customer to accept delivery satisfied the commercial impracticability test as set forth under UCC §2-615 and excused Amtraco from performance. See Goddard v. Ishikawojima-Harima Heavy Industry Co., Ltd., 29 A.D.2d 754, 287 N.Y.S.2d 901 (1st Dept. 1968), aff'd, 24 N.Y.2d 842 (1969).

After The Presupposed Condition
Failed, Amtraco Attempted To
Renegotiate The Contract In Good
Faith

Significantly, after the Canadian customer refused to

accept delivery of the lactose, Amtraco in good faith attempted to negotiate a new contract with BFG in substitution for the one that failed. See UCC §2-614. Thus, by telex dated May 24, 1972 (E 210), Amtraco, without prejudice to its rights, offered to purchase the lactose for \$150 per metric ton for a total price of \$75,570. However, by telex dated May 26, 1972 (E 21), BFG refused this offer. Again on June 2, 1972, Amtraco forwarded BFG another telex (E 22) in which Amtraco attempted to resolve the matter by offering, without prejudice, to purchase the lactose from BFG at the rate of \$160 per metric ton for a total of \$80,608. Significantly, this amount was greater than the \$80,402.18 BFG actually realized on the resale of the lactose in 1973 and 1974. However, BFG again refused this proposal (E 23).

Finally, by telex dated June 30, 1972, Amtraco made one last attempt, without prejudice and without contractual obligation, to resolve the dispute with BFG and offered to purchase the lactose for the sum of \$165 per metric ton for a total price of \$83,127. Again this amount was more than BFG eventually realized on its resale. However, BFG did not respond to this proposal and, instead, instituted the present lawsuit. It is therefore clear that Amtraco in good faith attempted to arrange for substituted performance once the presupposed condition of the initial purchase order failed but that BFG refused to accept such proposals. Accordingly, Amtraco should be completely excused from performance pursuant to UCC §2-615.

POINT III

BFG HAS FAILED TO PRESENT ANY EVIDENCE
ESTABLISHING ITS ENTITLEMENT TO DAMAGES
UNDER UCC §2-706. ACCORDINGLY THE JUDGMENT
OF THE DISTRICT COURT SHOULD BE SUSTAINED

It is well settled that the overall burden of proof with respect to damages is upon the plaintiff, Burke, Kuipers & Mahoney v. Dallas Dispatch Co., 253 App. Div. 206, 1 N.Y.S.2d 674 (1st Dept. 1938). Additionally, when plaintiff has under its control records and evidence which would establish its deductible savings in costs and other facts, which should be considered in mitigation of damages, the burden of evidence with respect to these matters should be upon the plaintiff as well. West, Weir & Bartel, Inc. v. Mary Carter Paint Co., 31 A.D.2d 517, 294 N.Y.S.2d 837 (1st Dept. 1968), mod. other grounds, 25 N.Y.2d 535 (1969):

"Furthermore, plaintiff was in control of the records and of the witnesses, whose testimony would establish its actual loss, including 'deductible savings in costs' (see 25 A.D.2d 81 89, 267 N.Y.S.2d 29, 37), and, therefore, the burden of evidence would rightfully be imposed on it. (See 31A C.J.S. Evidence §113). Otherwise put, we may, in any event, construe most strongly against the plaintiff all reasonable inferences which it had the opportunity to contradict by producing evidence within its control." 294 N.Y.S.2d at 838.

Thus, for a seller to establish damages under UCC §2-706, it must first satisfy its burden of establishing that "the resale

[was] made in good faith and in a commercially reasonable manner..." Accord: Anderson, Uniform Commercial Code §2-706:8 (1971). Indeed, the district court itself recognized this proposition when in its amended decision it stated that:

"It seems to us that where a statute confers a benefit on condition that certain acts are performed, the party claiming the benefit should bear the burden of establishing that he has indeed met the required conditions."
(A 163)

The official comments to UCC §2-706 amply bear out this conclusion. Official Comment No. 3 provides that:

"If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in subsection (1)."

Official Comment No. 2 defines what the prescribed standard of duty is:

"In order to recover the damages prescribed in subsection (1) the seller must act 'in good faith and in a commercially reasonable manner' in making the resale. This standard is intended to be more comprehensive than that of 'reasonable care and judgment' established by the prior uniform statutory provision. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708."

Thus, it is clear that the seller must establish that he has

complied with the standard of duty set forth in UCC §2-706 and *has* proved that he acted in good faith and in a commercially reasonable manner. Otherwise, he is relegated to the standards set out by UCC §2-708 pertaining to the difference between the market price and the contract price at the time of breach. BFG, however, has failed to prove or even claim any damages under UCC §2-708.*

Significantly, Official Comment No. 5 to UCC §2-706 explicitly states that the resale must be held ~~in~~ within a commercially reasonable time as defined by official comments Nos. 2 and 3 and "[w]hat is such a reasonable time depends upon the nature of the goods, the condition of the market and other circumstances of the case..." Obviously then, the very fact that a resale has been made cannot by itself constitute a finding that the resale was made in a commercially reasonable manner.

BFG citing Wurlitzer Company v. Oliver, 334 F. Supp. 1009 (W. D. Pennsylvania 1971), argues that there is a presumption that any resale made by plaintiff was made in a commercially reasonable manner. However, in that case the resale procedure appeared on its face to be reasonable and was made pursuant to

* BFG admittedly did not present any evidence under UCC §2-708 pertaining to the difference between the market price and the contract price at the time of breach, and the only evidence presented by Amtraco demonstrated that the market price was equal to or greater than the contract price. Thus, no claim for damages under UCC §2-708 has been made or proved. Harbor Hill Lithographing Corp. v. Dittler Bros. Inc., 76 Misc.2d 145, 348 N.Y.S.2d 920 (Sup. Ct. Nassau Co. 1973).

public notice published in a newspaper. The only question raised by the defendant with respect to the manner of sale related to whether plaintiff should dispose of the goods in one lot or in small individual quantities. Defendant presented no evidence whatsoever to indicate that a sale of individual quantities would have been preferable, but simply argued that as a matter of common sense this would have been the case. The court rejected this contention because of the lack of proof stating that "sufficient matters have not been presented for my consideration which would adequately support the defendant's claim." No statement was made by the court to the effect that there was a general presumption that the resale made by a plaintiff was to be deemed commercially reasonable as to time and manner. Indeed, Judge Knapp, in his amended decision, expressly rejected such a claim.*

In the present instance, the time and manner of the resale involved are on their face improper. Certainly BFG cannot argue that a resale made two years after the alleged repudiation date without further explanation should be deemed acceptable as

* BFG has apparently confused the difference between mitigation of damages with proof of damages. Obviously, if BFG resold the goods in a commercially reasonable manner, Amtraco could still attempt to prove that BFG could have mitigated its damages by taking other steps that were available to it. However, this fact in no sense detracts from BFG's obligation to prove that the sale was conducted in a commercially reasonable manner in the first instance.

a matter of course. Indeed, if anything, there is a presumption to the contrary. Thus, in Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136 (1940) the court specifically recognized that there is^a presumption that goods have a market value and that there is an available market for them:

"Because the measure of damages which must be applied in this action and, ordinarily in other actions brought by an unpaid seller for breach of a buyer's obligation to take and pay for goods, is the difference between the contract price and the market price or the value of the goods; and because there is no presumption that the goods are without value and that there is no available market for the goods, there is no sufficient basis for estimating the loss directly and naturally resulting from the buyer's breach of contract, unless the plaintiff supplies evidence of such facts or of other facts which would justify use of a different measure of the loss." Id. at 143.

Recently in Bache and Co., Inc. v. International Controls Corp., 339 F. Supp. 341 (S.D.N.Y. 1972), aff'd on opinion below, 469 F.2d 696 (2nd Cir. 1972), this Court held that for a resale to be deemed "commercially reasonable" it must be made as soon as practical following notice of the buyer's refusal to accept delivery:

"The term 'commercially reasonable' as used in §2-706 of the New York UCC is not specifically defined. However, the official comments of the framers of the Code and the case law development of the law of damages with respect to breach of contracts for the purchase of securities make it relatively clear

that 'commercially reasonable' requires that the resale occur as soon as practicable following notice of the buyer's refusal to accept tender of the securities."

* * * *

"The objective of §2-706(2) in encouraging the seller to obtain the best possible price by selling within a reasonable time after the breach without undue risk or expense is in accord with the basic principles of the law of damages that a plaintiff must minimize his losses." Id. at 350-51.

Similarly, in Nipkow and Kobelt, Inc. v. Saifka, 18 UCC Rep. 1213 (App. Term 1st Dept. 1976) the Appellate Term also recognized this principle emphasizing that such resale should normally occur immediately:

"Moreover, the resale could not be used as a measure of damages since it was not made as soon as practical after the breach. [citing Bache & Co., Inc. v. International Controls Corp.]"

In both cases the court barred an award of damages based on the resale price since the plaintiff had failed to establish that the resale was conducted in a commercially reasonable manner.

The same rationale is directly applicable to the facts here. It was conceded that a daily market existed for the sale of lactose and that the market price for several months after the date of the alleged breach was equal to if not greater than the contract price. Furthermore, Mr. Najda testified that the lactose

could easily have been sold within one or two weeks had an appropriate broker been contacted. Thus, there could be no rational reason for BFG to have retained the lactose for an extraordinary period of two years before selling it. See Uganski v. LHL Giant Crane and Shovel, Inc., 23 Mich. App. 88, 192 N.W.2d 580 (1971) (resale after two years blatantly unreasonable and cannot be considered as a proper measure of damages.)

Additionally, in view of Mr. Najda's testimony that the age of lactose will affect its value and the fact that by the time the lactose was sold the market price had decreased to some degree, there can be no basis upon which the resale price can be deemed a reasonable reflection of the market price two years earlier. Thus, on this basis as well, the resale price should be rejected as an appropriate measure of damages.

Because of such circumstances, it is specious for BFG to argue that there is no question as to the extent of the damages BFG incurred and that the only issue in dispute is whether BFG's resale was commercially reasonable. This begs the very question at issue. The fact is that if BFG had resold the lactose in a commercially reasonable manner, it would not have incurred any damages since it could have immediately resold the lactose at a price equal to or greater than the contract price.

There also can be no basis for BFG's assertion that Mr. Baumann's testimony established that all the elements of the resale, including the method, manner, time, place and terms, were proper. Indeed, Mr. Baumann did not discuss the manner or method of the resale at all and, admittedly, did not have any knowledge whatsoever of the details of such resale. His only testimony was that as a general principle it might be better to sell the lactose in small lots rather than one large lot. However, he did not testify as to when such a sale should occur or whether it was made in a commercially reasonable time. Furthermore, BFG's own records demonstrate that BFG did not attempt to sell the lactose in small quantities but sold the lactose in three large lots one-and-a-half to two years after the alleged repudiation date.

It is also highly misleading for BFG to suggest at page 19 of its Brief that the condition of the market for the period after the date of the alleged breach was depressed and justified BFG's conduct. While Mr. Baumann did state that during the period involved the state of the market was depressed, the fact is that the market price was not depressed as compared to the contract price. Indeed, it was unrefuted that the market price was equal to if not greater than the contract price. The fact that the market price might have been lower than the market price had been in prior years is totally irrelevant then to BFG's conduct.

Furthermore, the price BFG eventually obtained for the

resale of the lactose was approximately \$15,000 less than the contract price. Had BFG attempted to sell the lactose in a commercially reasonable manner, such a differentiation would not have occurred. Accordingly, it is improper for BFG to suggest that the only issue involved is whether the resale was reasonable rather than if too much time was taken before conducting the resale. The fact is that it was because of the time taken in conducting the resale that the resale price was so low.

BFG also refers to a quotation from Anderson in an attempt to justify the fact that it retained the lactose for a period of time. However, this quotation is taken out of context and is highly misleading. In the paragraph preceding the quote referred to by BFG, Anderson makes the following comment:

"The question may arise whether the seller had delayed too long in making a resale of the goods. With respect to this question, a distinction must, it seems, be made between an executory contract to sell and a sale where the title has already passed to the buyer. In the former case, the object of the resale is simply to determine exactly the seller's damages. These damages are the difference between the contract price and the market price at the time and place when performance should have been made by the buyer. The object of the resale in such a case is to determine what the market price in fact was. Unless the resale is made at about the time when performance was due it will be of slight probative value, especially if the goods are of a kind which fluctuate rapidly in value, to show what the market price actually was at the only time

which is legally important. If no reasonable market existed at this time, no doubt a delay may be proper and a subsequent sale may furnish the best test, though confessedly not a perfectly exact one, of the seller's damage."
(2 Anderson, Uniform Commercial Code, 384-85 (2d Ed. 1971)).

Thus, Anderson also recognizes that for purposes of determining damages, it is essential that the resale occur as promptly as possible unless some evidence is offered to justify retaining the lactose. Here, of course, no such evidence was presented. Thus, no justifiable reason existed for retaining the lactose rather than immediately selling it.*

The simple fact is that without any excuse or justification BFG retained the lactose for an incredibly long period of time and sold it when the resale price could in no sense be deemed a fair reflection of the damages, if any, BFG actually incurred. Furthermore, and as will be discussed in greater detail below, because of BFG's decision to retain the lactose, incredible storage charges were incurred at the rate of \$2,700 per month. Obviously, since BFG could have immediately resold the lactose at a price equal to if not greater than the contract price, within one or two weeks after the date of the alleged

* It should also be emphasized that Anderson's distinction between executory contracts and contracts where title has already passed has been rejected by official comment No. 3 to UCC §2-706. It is there stated that "The distinction drawn by some courts between cases where the title has not passed to the buyer and the seller has resold as owner and cases where the title has passed and the seller has resold by virtue of his lien on the goods, is rejected."

breach, no claim for such damages can be made by BFG upon Amtraco.

BFG Never Gave Amtraco
Notice Of Resale

UCC §2-706 specifically states that:

"(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell."

In Portal Galleries, Inc. v. Tomar Products, Inc., 60 Misc.2d 523, 302 N.Y.S.2d 871 (1969) the court specifically held that the failure to give such notice constituted a bar to the seller's recovery of damages under UCC §2-706.

"If seller wished to recover damages, that is the difference between the resale price and the contract price, its remedy was to resell the undelivered balance of the contract and give the defendant notification of its intent. [Uniform Commercial Code, §2-706(1)]. Seller gave buyer no reasonable notification of its intention to resell and accordingly it is not entitled to recover the difference between the resale price and the contract price. (Foster v. Colorado Radio Corp., 10 Cir., 381 F.2d 222)."

BFG has argued that Amtraco has presented no proof that it did not have notice of BFG's intention to resell. However, as with the other elements of proof, the burden is upon BFG to establish that it notified Amtraco of its intent to resell, not for Amtraco to prove that it was not notified. Thus, as stated by the court in Nipkow & Kobelt, Inc. v. Saifka, supra:

"However, we find no proof in the record that [the seller] gave notification of its intention to resell...out of private sale. Therefore, it was not entitled to recover the difference between the resale and the cost price under UCC §2-706(3)."

Accordingly, BFG is barred from recovering damages under UCC §2-706 on this ground as well.

POINT IV

SINCE THE INCIDENTAL DAMAGES CLAIMED
BY BFG WERE INCURRED IN CONNECTION WITH
A COMMERCIALY UNREASONABLE RESALE, BFG
IS BARRED FROM RECOVERING SUCH INCIDENTAL
DAMAGES AS WELL.

UCC §2-710 authorizes the recovery of any incidental damages only if such damages consist of any "commercially reasonable charges, expenses or commissions incurred..." It follows from this language that, since any incidental damages which BFG might have incurred in the present instance were incurred with respect to a commercially unreasonable sale, there is no proof as to what incidental damages BFG might have incurred had it conducted a commercially reasonable sale. Accordingly, there is no basis upon which any of the alleged incidental damages claimed by BFG could be recovered. This is particularly true with respect to the storage charges since such storage charges were only incurred because BFG failed to sell the lactose in a commercially reasonable manner and retained the lactose for an unconscionable period of time.

In Worcester Bleach and Dye Works Co. v. Dlugasch, 181 N.Y.S. 44 (1st Dept. 1920) it was recognized that incidental damages such as storage charges may not be recovered in the absence of proof that they were required to affect a proper resale of the merchandise in question.

"Whether or not there actually was an available market, in which these goods could have been sold for a price higher than the plaintiff received, can be determined better upon a retrial; but, assuming that the plaintiff had a right to resell the goods as defendant's agent in the manner it did, it still would not be entitled upon the present record to recover for cartage, storage, and personal expenses. There is not a scintilla of evidence that any of these expenses were reasonable, or were required in order to effect the resale,..." Id. at 45.

See For Children, Inc. v. Graphics International, Inc., 352 F. Supp. 1280 (S.D.N.Y. 1972).

Similarly, in E. Z. Roll Hardware Mfg. Co., Inc. v. H & H Products & Finishing Corp., 4 UCC Rep. 1045 (Sup. Ct. N.Y. Co. 1968), the court specifically recognized that the failure to establish damages under UCC §2-706 will bar the recovery of any incidental damages as well:

"To qualify for incidental damages as contemplated by UCC §2-710 there must be compliance with the statutory provisions [of UCC §§2-709, 2-706] designed to minimize damages. No such action was taken in this case."

Likewise, at 3 Williston on Sales (4th ed. 1974) Section 24.8, page 421, it is stated:

"In order to recover damages under Section 2-710, it is essential that the seller comply with all the terms of Section 2-706. If he does not he is limited to those damages which are permissible under Section 2-706."

In an attempt to justify the recovery of incidental damages, BFG has again referred to a quote from Williston taken out of context. At page 29 of its Brief, BFG quotes a provision from Williston which appears to indicate that in an action for the price under UCC §2-709 if the seller cannot establish the facts which would entitle him to recover the price, he may still recover incidental damages. However, this statement was made in regard to a specific discussion of UCC §2-709 and the problems that arise when a seller cannot qualify under the requirements of that provision, limiting an action for the price to situations where the goods cannot be sold because the circumstances reasonably indicate that such efforts of resale would be unavailing. As Williston recognizes, this is a totally different situation from a seller's failure to comply with the commercial reasonableness standards of UCC §2-706. BFG here had an opportunity to comply with UCC §2-706 but through its own fault failed to do so. Because of this, its resale was deemed commercially unreasonable by the District Court and its request for damages under this provision was rejected. Likewise, it may not recover incidental damages under this provision since there is no possible way to ascertain what incidental damages, if any, it would have incurred had it conducted the resale in a commercially reasonable manner.

CONCLUSION

For the foregoing reasons, the District Court's judgment

with respect to the issues of damages should be affirmed and
the District Court's judgment with, ^{respect to the} ~~such~~ issues of liability
should be reversed in favor of the defendant Amtraco Corporation.

Respectfully submitted

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Of Counsel:

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THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BANK FUR GEMEINWIRTSCHAFT

V.

AMTRACO CORP

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF

NY

, ss:

BERNARD S. GREENBERG,

being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E. 7th NY, NY

That on the 30th day of september, 1976 19 at
defendant-appellee-appellant

he served the annexed

upon

Fox Glynn & Melamed, 299 Park avenue, NY, NY

in this action, by delivering to and leaving with said attorney
two true cop thereof.DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said

Deponent is not a party to the action.

30th

Sworn to before me, this

september, 1976

day of 19

*Bernard S. Greenberg**Roland W. Johnson*
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977